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FSB (erroneously sued as "World Savings, Inc.
dba World Savings Bank FSB")

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JUAN CUEVAS,

Plaintiff,

VS.

ATLAS REALTY/FINANCIAL SERVICES,
INCORPORATED, a California corporation, dba
ATLAS REALTY, dba ATLAS FINANCIAL
SERVICES, ALVIN CLAIR SILBERNAGEL,
SAMANTHA TREVINO, WORLD SAVINGS,
INC., dba WORLD SAVINGS BANK, FSB, and
DOES 1 to 100,

Defendants.

Case No. C07 02814 JF

WORLD SAVINGS BANK, FSB'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Date: December 14, 2007
Time: 9:00 a.m.
Place: Department 3
Compl. Filed: May 30, 2007

Honorable Jeremy Fogel

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1 I. INTRODUCTION

2
3 Plaintiff argues for a series of impermissible results. First, he contends that the State of
4 California may require a federally chartered bank to provide loan-related disclosures in foreign
5 languages via California Civil Code Section 1632. Such an outcome would be contrary to both
6 statutory and caselaw holding that states may not, even under the guise of a generally applicable law,
7 regulate the mortgage disclosures of federally chartered bank. Moreover, requiring lenders to
8 provide different disclosures for each state (as would be the case in California versus other states if
9 Section 1632 applied here) defeats the Home Owners' Loan Act's [12 U.S.C. § 1461 *et seq.*
10 ("HOLA")] stated goal of national uniformity over the regulation of the lending activities of federal
11 savings banks.

12
13 Second, Plaintiff seeks to use California Business and Professions Code Section 17200 *et*
14 *seq.* ("UCL") to enforce alleged federal Truth in Lending Act ("TILA") violations. Further,
15 pursuant to the UCL, Plaintiff seeks an injunction regulating Defendant World Savings Bank, FSB's
16 ("World") lending activities. Controlling caselaw and the Office of Thrift Supervision ("OTS")
17 forbid such use of state laws to supplement TILA. In any event, Plaintiff is not entitled to injunctive
18 relief regarding the general lending activities of World under the UCL because he has not pled the
19 requisite class certification requirements. (Plaintiff's disingenuous claim that he seeks such relief
20 only as an aggrieved individual must be swept aside, for it is clear that what Plaintiff demands is not
21 an injunction affecting strictly his own dealings with World, but in fact one that would control the
22 whole of World's lending business.) Once again, this state law claim is preempted by HOLA and,
23 therefore, should be dismissed.

24
25 Third, Plaintiff contends that he may rely on contradictory and boilerplate allegations of
26 agency to impute his mortgage brokers' duty and conduct to World. Plaintiff had no extra-
27 contractual relationship or communications with World, and Plaintiff unequivocally admits that he
28 never believed that World was represented by the broker defendants. Caselaw holds that boilerplate

1 allegations of agency are insufficient to allege conspiracy and/or agency in the face of such facts.
 2 Plaintiff cannot retroactively create a presumption of agency when he admits there was none before.
 3 Therefore, Plaintiff's claims for negligence, unjust enrichment and punitive damages fail. In any
 4 event, HOLA preempts these state law claims as well because Plaintiff seeks to apply them to
 5 regulate World's loan marketing and disclosure activities.

6

7 Finally, Plaintiff seeks to avoid inevitable preemption by arguing: 1) that the Court cannot
 8 properly judicially notice World's status as a federally chartered bank –even though Plaintiff himself
 9 elected to name World as a defendant using the legally recognizable “FSB,” or federal savings bank,
 10 designation, and although there is no possibility that World is not such an entity; and that, in any
 11 event, 2) the Court should grant leave to amend. First, courts routinely judicially notice a bank's
 12 federally chartered status. Judicially noticing such a readily verifiable fact is undeniably proper.
 13 Second, Plaintiff should not be granted leave to (again) amend, because he cannot plead any facts
 14 that would cure the legal defects in his First Amended Complaint (“FAC”).

16 **II. LEGAL ANALYSIS**

18 **A. HOLA Preempts Section 1632 As Plaintiff Seeks To Apply It**

20 Plaintiff seeks to use California Civil Code section 1632 to require federally chartered
 21 banks to include mortgage disclosures in foreign languages. Plaintiff contends that “pertinent
 22 authority establishes that state statutes directed generally to commercial transactions, like Section
 23 1632, are not preempted by HOLA.” Opp. at 7:3-4. This is simply not the law.

25 HOLA and associated caselaw unequivocally hold that state laws, even laws of
 26 general applicability, are preempted *when those laws are used in an attempt to regulate the*
 27 *mortgage disclosures of a federally chartered bank.* Lopez v. World Savings & Loan Assn., 105
 28 Cal. App. 4th 729, 741 (2003); In re Ocwen Loan Servicing, 491 F.3d 638, 643-45 (7th Cir. 2007).

1 In support of his argument that HOLA does not preempt state common law claims and claims of
 2 general applicability, Plaintiff inexplicably cites In re Ocwen Federal Bank, FSB Mortgage
 3 Servicing, MDL 1604, 04C2714, 2006 WL 794739, *1 (N.D. Ill. 2006). See Opp. at 16:14-15. Not
 4 only is Ocwen no longer good law for the proposition cited, its progeny mandate a finding of
 5 preemption here. The Seventh Circuit reviewed the decision Plaintiff cites and found that HOLA
 6 preempted many of the generally applicable state statutes and common law claims in the complaint.
 7 In re Ocwen Loan Servicing, 491 F.3d at 648 (“Some of the charges are, pretty clearly, even
 8 certainly preempted, as we have tried to indicate.”) Noting the importance of construing 12 C.F.R.
 9 560.2(c) narrowly, the Court provided the following guidance to those analyzing preemption:

10 “The list in subsection (c) is long and the categories it covers – contract and
 11 commercial law, tort law, and so forth – are very broad. It would not do to let the
 12 broad standards characteristics of such fields morph into a scheme of state regulation
 13 of federal S&Ls. Hence the statement in subsection (c) that state laws escape
 14 preemption only ‘to the extent that they only incidentally affect the lending operations
 15 of Federal savings associations or are otherwise consistent with the purposes of
 16 paragraph (a) of this section.’”

17 Id. at 643.

18 In remanding, the Seventh Circuit explicitly recognized that plaintiffs’ UCL claim was likely
 19 preempted because the activity Plaintiff sought to regulate could interfere with federal regulation of
 20 “disclosure, fees, and credit terms.” Id. at 646. In sum, the Court made clear that HOLA preempts
 21 state statutes and common law claims when a plaintiff uses those laws in an attempt to regulate
 22 lending activities of a federally chartered bank.

23 Relying on Ocwen, another federal district court, in Prince-Servance v. BankUnited,
 24 FSB, 2007 U.S. Dist. LEXIS 81774 (N.D. Ill. November 1, 2007), recently confirmed this point.
 25 There, the plaintiff sued her broker and lender for, among other things, breach of fiduciary duty and
 26 violation of the Illinois Consumer Fraud and Deceptive Practices Act (“ICFA”). Id. at *7. In
 27 response to defendant bank’s motion to dismiss, plaintiff claimed that HOLA did not preempt laws
 28 of general applicability. Id. at *12. In rejecting this argument as a misstatement of the law, the court
 stated, “It is clear from the language of the regulation and subsequent caselaw that *to the extent* a

1 generally applicable law interferes with a federal savings association's lending activity it is
 2 preempted." Id. (emphasis added.) Further, the court confirmed that if a state law regulates any of
 3 the activity outlined in 560.2(b), "it is preempted and no further analysis is needed." Id. at *11. In
 4 cases where further examination is required, the court emphasized that, when examining a state law
 5 to see if it fits into 12 CFR 560.2(c)'s narrow exceptions, "any doubt should be resolved in favor of
 6 preemption." Id. at *12. Moreover, after noting that loan-related disclosures are exclusively within
 7 the purview of TILA, the court held that HOLA preempted plaintiff's claims for breach of fiduciary
 8 duty and violation of the state's consumer protection statute. Id. at *14. To hold otherwise, the
 9 court reasoned, would be to create a "hodgepodge of state regulations,"¹ exactly what the OTS was
 10 attempting to prevent through preemption. Id. citing, Haehl v. Washington Mutual Bank, 277 F.
 11 Supp. 933, 942 (S.D. Ind. 2003).

12

13 In re Ocwen and Prince make clear that in analyzing HOLA preemption with respect
 14 to a law of general application, the question is whether the law *as it purportedly is being applied*
 15 "interferes with a federal savings association's lending activity," not whether the law as written
 16 purports to cover such activity. The former test ferrets out exactly what the OTS is concerned about,
 17 which is a state law that is designed to look like a law of general application, but in fact aims at
 18 regulating the relationship between a borrower and a lender. Prince, 2007 U.S. Dist. LEXIS 81774
 19 at *12. The latter test, on the other hand, is meaningless; it would never result in a law of general
 20 application being preempted no matter what actual affects it might have.

21

22 Applying Prince and In re Ocwen to the present case, it is clear that HOLA preempts
 23 Section 1632 as Plaintiff seeks to apply it. First, it is undisputed that Plaintiff attempts to use
 24 Section 1632 to require lenders to include disclosures in specific languages. This is a substantive

25

26 1 This is a reference to the OTS' long-held position that "federal lending law and regulations occupy the entire field of
 27 lending regulation for federal savings associations" in order to avoid a "hodgepodge of conflicting and overlapping state
 28 lending requirements" that would be inefficient and slightly burden the associations' ability to create nationally uniform
 lending practices. Id. at *8-9 citing 61 FR 50951, 50965 (1996).

1 requirement, the importance of which is emphasized by the “penalty” for a savings bank’s failure to
 2 comply – a complete subsequent unwinding of the loan transaction. See Civ. Code §1632(k). Thus,
 3 the statute seeks to regulate lending disclosures and no further analysis is necessary; the statute is
 4 preempted. See Prince, 2007 U.S. Dist. LEXIS 81774 at *11-12, citing 61 Fed. Reg. 50951, 50965-
 5 67 (1996).

6

7 At a minimum, the law’s effect on lending disclosures creates a presumption of
 8 preemption. Id. “The presumption can be reversed only if the law can clearly be shown to fit within
 9 the confines of paragraph (c). For these purposes, paragraph (c) is to be interpreted narrowly.” Id.
 10 Just as HOLA preempted plaintiff’s claims based on generally applicable laws (IFCA and breach of
 11 fiduciary duty) in Prince, HOLA preempts Plaintiff’s Section 1632 claim here even though the law
 12 applies to businesses other than lenders. Per the court’s reasoning in Prince, loan-related disclosures
 13 are wholly within the purview of TILA, and any attempt by a state to regulate disclosures must fail.
 14 Id. at *14. Any other holding would create a “hodgepodge” of requirements, varying from state to
 15 state, regarding the form and content of mortgage-related disclosures. Id.

16

17 Plaintiff’s argument that Section 1632 does not regulate the “content” of a disclosure,
 18 but only its “communication” [Opp. at 6:9-13 and 8:17 and n 1], misses the point entirely. By
 19 Plaintiff’s logic, each of the fifty states would be free to regulate all manner of communication of
 20 loan disclosures, whether by dictating font size or color, placement within in a promissory note or
 21 deed of trust, requiring special addenda or one or more separate disclosures, mandating the number
 22 of times the disclosure is made or even legislating the medium of communication to be used (oral,
 23 written, written supplemented by oral or the use of red, white or blue paper, etc.), all so long as the
 24 actual “content” of the disclosure is not dictated. And apparently it does not bother Plaintiffs that
 25 the states can also impose the ultimate draconian penalty on the federal savings bank - rescission –
 26 for failing to strictly follow fifty or more such idiosyncratic requirements, just so long as the
 27 requirements are “agnostic to the terms of the contract.” But this would expose federal savings
 28 banks to an endless variety of possible regulations, and is precisely the scenario that HOLA was

1 designed to avoid.

2
 3 Neither does it help Plaintiff to argue that Section 1632 (or any other state law-based
 4 requirement for a communication that is intended to “help” make sure that a borrower is aware of
 5 and understands what they are signing) is “in harmony with the HOLA statutes and regulations.”
 6 Opp. at 6:13-16. Avoiding well-meaning, but likely widely varying, “assistance” from the states to
 7 HOLA is exactly why the OTS chose to occupy the field of lending regulation. In any event, any
 8 state law, such as Section 1632, that would permit rescission of a federal saving’s bank-issued loan
 9 for transgressions other than those enumerated in TILA is not “in harmony” with HOLA.
 10

11 Plaintiff’s Second Cause of Action should be dismissed, with prejudice.
 12

13 **B. HOLA Preempts Plaintiff’s UCL Cause Of Action**
 14

15 Plaintiff offers three arguments why the UCL is not preempted as he seeks to apply it
 16 to World. First, he contends his Section 1632 claim gives rise to a valid UCL claim. As outlined
 17 above, Plaintiff’s 1632 claim is preempted. Thus, the portion of Plaintiff’s complaint seeking relief
 18 under the UCL for World’s alleged 1632 violation should be stricken.
 19

20 Second, despite caselaw with a directly contrary holding, Plaintiff asserts that TILA
 21 violations may serve as “predicates for a Section 17200 claim because Mr. Cuevas does not seek to
 22 enforce TILA in any way that is different from the remedies accorded by the statute itself.” Opp. at
 23 12:16-18. But Plaintiff ignores Silvas’ plain language stating, “the OTS has concluded that state
 24 laws are preempted by HOLA even if they do no more than copy TILA’s requirements.” Silvas v.
 25 E*Trade Mortgage Corporation, 421 F. Supp. 2d 1315, 1319, fn 2 (S.D. Cal. 2006). Plaintiff’s
 26 assertion is also factually inaccurate. Plaintiff seeks injunctive relief as part of his UCL claim, a
 27 remedy not available under TILA. See FAC ¶ 81; see also Opp. at 17:4-5. Thus, even under
 28 Plaintiff’s flawed interpretation of Silvas, 421 F. Supp. 2d 1317, his UCL claim fails because it seeks

1 to supplement TILA's exclusive remedies. Therefore, Plaintiff's allegation that he is entitled to
2 relief under the UCL based on World's alleged TILA violations should also be stricken.

3
4 Third, Plaintiff offers four "factual" allegations to support his UCL claim. However,
5 these allegations are thinly veiled TILA claims and, thus, HOLA preempts them. The OTS confirms
6 that HOLA preempts the UCL as it applies to disclosures of federally chartered banks. See Opinion
7 Letter by Chief Counsel Carolyn J. Buck, at 15, 17-18 (Mar. 10 1999) ("Mar. 10 Opinion Letter")
8 (attached to Supplemental Request for Judicial Notice as Exhibit 1); see also, In re Ocwen, 491 F.3d
9 at 646 (confirming that HOLA preempts the UCL when a plaintiff attempts to use the statute to
10 regulate lending disclosures). Relying on 12 C.F.R. Section 560.2 and examples cited therein, the
11 OTS concluded that HOLA preempts application of the broad provisions of UCL, including the use
12 of the terms "unfair" and "fraudulent," in a manner that would apply to federally chartered loan
13 associations' disclosures. Id. In so concluding, the OTS relies on a California appellate opinion
14 where the court held that UCL claims based on fraud and misrepresentation were preempted by 12
15 C.F.R. § 563.27. See Mar. 10 Opinion Letter at 15 fn 69.
16

17 Plaintiff implicitly concedes that his allegations in ¶ 78(a) and (c) of the FAC cannot
18 serve as the basis for a valid UCL cause of action. See Opp 13:10-12. Thus, these portions of the
19 Complaint should also be stricken.
20

21 Finally, in a futile attempt to salvage his UCL claim, Plaintiff relies solely on his
22 allegations that Atlas, Trevino and Silbernagel – not World - misrepresented the terms of the loan
23 and that "someone" falsified his signature on the notice of right to cancel. See FAC ¶ 78 (b) and (d).
24 Nowhere in his Complaint or his Opposition does Plaintiff explain how World misrepresented the
25 terms of the loan. Indeed, Plaintiff does not even name World as a defendant in his causes of action
26 for negligent misrepresentation or fraud. Plaintiff instead challenges the adequacy of World's
27 disclosures setting forth the terms of the loan. But HOLA explicitly preempts any state law
28

1 purporting to govern the content of a federally chartered bank's mortgage disclosures.² 12 C.F.R. §
 2 560.2; See also Lopez v. World Savings & Loan Assn., 105 Cal. App. 4th 741; In re Ocwen, 491
 3 F.3d at 646; Prince, 2007 U.S. Dist. LEXIS 81774 at *11-12; Mar. 10 Opinion Letter at 15 fn 69
 4 (certain UCL claims based on fraud and misrepresentation are preempted by 12 C.F.R. §563.27).
 5 Thus, Plaintiff's UCL cause of action based on World's alleged fraud should be stricken.

6

7 Similarly, Plaintiff's allegation that "Defendants" forged his initials and made
 8 handwritten changes on the Notice of Right to Cancel required by 12 C.F.R. § 226.23(b)(1) is an
 9 improper attempt to supplement TILA's necessarily exclusive remedies for failure to provide proper
 10 Notice of Right to Cancel. Notably, the Notice of Right to cancel is not a contract and need not be
 11 signed. See 12 C.F.R. 226.17(a) fn 37. Instead, it is a lending disclosure specifically required by
 12 Regulation Z. See 12 C.F.R. 226.23(b)(1). Regulation Z necessarily provides the *exclusive* remedy
 13 for failing to provide adequate Notice of a Right to Cancel. It also governs the ability of a bank to
 14 change the Notice of Right to Cancel. See 12 C.F.R.226.23(b)(2). Again, HOLA preempts
 15 application of state laws seeking to govern such disclosures. 12 C.F.R. § 560.2; See also Lopez v.
 16 World Savings & Loan Assn., 105 Cal. App. 4th 741; Prince, 2007 U.S. Dist. LEXIS 81774 at *11-
 17 12. Thus, ¶ 78(d) of Plaintiff's FAC should be stricken as well.

18

19 **C. Plaintiff's Negligence Claim Is Preempted And, In Any Event, Fails To State A Claim
 Because World Did Not Owe Plaintiff A Duty**

20

21 Plaintiff's negligence claim against World is similarly preempted. First Plaintiff
 22 seeks to rely on World's alleged TILA and Section 1632 violations as the basis for his negligence
 23 claim. As outlined above, even generally applicable statutes and common-law causes of action are
 24 preempted when they are used to regulate a federally chartered bank's lending activities. Silvas v.

25

26 2 To the extent Plaintiff for some reason seeks to include impute Trevino's alleged misrepresentation/fraud to World
 27 here, after omitting it from Plaintiff's causes of action for misrepresentation, his claim also fails because Trevino was not
 28 World's agent as a matter of law. See agency/conspiracy discussion below. In any event, as the Court in In re Ocwen
 noted, Plaintiff's claim of fraud regarding the terms of the loan fails to state a claim because "how can the material terms
 of the loan be concealed when they are set forth in the loan documents?" 491 F.3d at 645.

1 E*Trade Mortgage Corporation, 421 F. Supp. 2d 1317; see also Prince, 2007 U.S. Dist. LEXIS
 2 81774 at *11-12; Mar. 10 OTS Letter at 15. Just as the plaintiff in Silvas could not employ the UCL
 3 to supplement TILA, neither can Plaintiff rely on a TILA violation to give rise to a common law
 4 negligence claim. Similarly, Plaintiff may not resurrect his preempted section 1632 by couching it
 5 as “negligence per se.” Thus, the statutory violations Plaintiff alleges are insufficient to support a
 6 cause of action for negligence and such allegations should be stricken.

7
 8 Plaintiff further seeks to state a negligence claim by alleging that “Defendants”
 9 breached their duties of care “in performing their mortgage brokering and lending services by”:

10
 11 a) failing to explain the terms of the refinance transaction and loan agreement
 12 b) failing to ensure that Mr. Cuevas understood the terms of the transaction and loan
 agreement
 13 c) failing to provide a translation of the loan documents in Spanish
 14 d) failing to submit truthful financial information and confirm the accuracy of such
 information
 15 e) failing to provide Mr. Cuevas with signed accurate copies of the Right to Cancel
 16 Notice

17 See FAC ¶ 84.

18
 19 None of the above is sufficient to state a claim for negligence against World.
 20 Allegation “c” merely restates Plaintiff’s 1632 cause of action while “e” is an alleged TILA
 21 violation. As outlined above, these “facts” cannot serve as the basis of a valid negligence claim
 22 because HOLA would preempt such application. Similarly, allegations “a” and “b” seek to
 23 improperly regulate World’s lending activities. TILA specifically outlines a lender’s duty to
 24 disclose the terms of a loan. See 12 C.F.R. § 226.17 *et seq.* State law (including common law)
 25 cannot impose alternative requirements. See Silvas, 421 F. Supp. 2d 1317; Mar. 10 OTS Letter at 15
 26 fn 69; Prince, 2007 U.S. Dist. LEXIS 81774 at *11-12. Finally, Plaintiff’s allegation in “e” is
 27 another improper attempt to regulate World’s lending activities. Specifically, Plaintiff seeks to
 28 require the federally chartered bank to verify a potential borrower’s financial information submitted

1 to it and only disburse funds if such information is accurate. Deciding to whom to lend is the most
2 fundamental of lending activities. Any attempt to employ state law as part of an effort to regulate
3 such lending activities must fail. In re Ocwen, 491 F.3d at 646.

4

5 In any event, World did not owe Plaintiff a duty of care. Any attempt to impute
6 Trevino's duty to World necessarily fails because Plaintiff cannot rely on his generic agency
7 allegations to salvage his defective claims. California law does not recognize creation of a duty by
8 generic allegations of agency. United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d
9 568, 594-595 (1970); see also In re Textainer Partnership Sec. Litig., 2005 WL 3801596 *16 (N.D.
10 Cal. 2005) (dismissing claims for aiding and abetting because plaintiff's allegations were
11 "conclusory in nature"). Similarly, conclusory allegations of conspiracy are insufficient to withstand
12 a motion to dismiss. Schneider v. Traweek, 1990 U.S. Dist. LEXIS 15563 *23 (D. Cal. 1990).

13

14 In his FAC and Opposition, Plaintiff often confuses the terms "conspiracy" and
15 "agency." In California, agency is actual or ostensible. Cal. Civ. Code § 2998. Actual agency
16 requires the agent be employed by the principal. Cal. Civ. Code § 2999. Ostensible agency "must
17 be based upon acts or declarations of the principal and not on the conduct or representations of the
18 alleged agent." Petersen v. Securities Settlement Corporation, 226 Cal. App. 3d 1445 (1991)
19 (granting demurrer for failure to adequately allege agency); see also Cal. Civ. Code § 2300. Further,
20 an allegation of ostensible agency necessarily requires that the plaintiff plead that he actually
21 believed that the alleged agent had authority to act on behalf of the principal. Id. Neither agency
22 relationship can exist unless the principal exercises some power or control over the alleged agent.
23 Violette v. Shoup, 16 CA 4th 611, 619 (1993). When the facts are not disputed, agency is a question
24 of law. Magnecomp Corp. v. Athene Co., 209 CA 3d 526, 536 (1989).

25

26 Plaintiff's FAC is devoid of any meaningful factual allegations necessary to support
27 its agency claim against World. Rather than setting forth facts, Plaintiff offers only a boilerplate and
28 internally inconsistent allegation of agency ("each of the Defendants was the agent, servant and/or

1 employee of each other defendant.”). FAC ¶ 7. Per Haidinger, such generic allegations are
 2 insufficient to plead actual agency or impute a duty to World. Haidinger-Hayes, Inc., 1 Cal. 3d 594-
 3 595. Neither can Plaintiff plead ostensible agency. He concedes that he believed that Trevino was
 4 acting on his behalf and *not* World’s. FAC ¶ 23. California law confirms that Plaintiff’s assumption
 5 was correct. Ruiz v. Decision One Mortg. Co., LLC, 2006 Dist. LEXIS 54571 at *3 (N.D. Cal. July
 6 25, 2006) (“California courts have held that, in general, there is no duty of care owed to a borrower
 7 by a lender”); Plata v. Long Beach Mortgage Co., No. C 05-02746 JF, 2005 WL 3417375, at *6
 8 (N.D. Cal. Dec. 13, 2005) (“In California, generally, there is no duty of care owed to a borrower by a
 9 lender”). Because he admits never believing that Trevino acted on behalf of World, Plaintiff’s
 10 (ostensible) agency allegation also fails. Petersen, 226 Cal. App. 3d 1445; see also Cal. Civ. Code §
 11 2300.

12
 13 Subsequently, Plaintiff confirms that World did not misrepresent any material fact.
 14 He alleges, “Trevino who made the misrepresentations herein alleged was the sales person and
 15 therefore the agent and employee of Defendants Silbernagel and Atlas...” Id. at ¶ 39. Notably,
 16 Plaintiff contradicts his boilerplate agency allegation here by correctly failing to contend that
 17 Trevino was World’s employee. Instead, in a blatant effort to find “deep pockets,” Plaintiff offers
 18 another generic allegation - “Defendant World Savings Bank conspired with co-Defendants to make
 19 such misrepresentations in order to induce Mr. Cuevas to enter into the ruinous transaction.” Id. at
 20 40. Nowhere in the FAC, however, does Plaintiff allege what acts World undertook to “conspire”
 21 with co-Defendants. Such allegations are a far cry from the affirmative conduct necessary to
 22 establish a conspiracy. See Schneider, 1990 U.S. Dist. LEXIS 15563 *23. Plaintiff’s conclusory
 23 allegations mimicking the legal standards necessary to state a claim for agency or conspiracy are
 24 simply insufficient. Id. Consequently, Plaintiff’s claims based solely on this flawed attempt to
 25 impute Trevino’s conduct to World necessarily fail.

1 **D. Plaintiff's Unjust Enrichment Claim Is Preempted**

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3 Like his arguments regarding other state law causes of action, Plaintiff's contentions
 4 regarding his unjust enrichment claim miss the point. As the court in Prince explained, a plaintiff
 5 may not use a common law cause of action to regulate a bank in a way that would be impermissible
 6 if that law were codified. Mar. 10 OTS Letter at 15 fn 69; Stoneking v Bank of Am., N.A., 132
 7 N.M. 79 (2002) (upholding demurrer of various actions, including unjust enrichment, because
 8 HOLA preempted those claims). The cases Plaintiff cites only underscore this principle. See
 9 Binnett v. Washington Mut. Bank, 446 F. Supp. 2d 217, 219 (S.D.N.Y. 2006) (unjust enrichment
 10 claim in conjunction with breach of contract and consumer fraud causes of action not preempted
 11 because the state laws, *as applied*, did not have more than an incidental effect on lending activities);
 12 In re Ocwen Federal Bank, FSB Mortgage Servicing, MDL 1604, 04C2714, 2006 WL 794739, *1
 13 (N.D. Ill. 2006) (holding rejected by the Seventh Circuit which remanded based on finding that
 14 preemption "certainly" barred many of plaintiffs' common law claims)³; Leto v. World Savings and
 15 Loan Ass'n, 98CA02610G, 1998 WL 1784221, (W.D. Tex. 1998) (holding only that plaintiff's
 16 claim did not raise a federal question warranting removal, and noting that preemption may still bar
 17 his unjust enrichment claim to the extent it more than incidentally affects the lending operations of
 18 defendant bank). Here, Plaintiff has no cause of action for breach of contract and instead bases his
 19 unjust enrichment claim on World's alleged negligence and fraud⁴. Opp. 16:7-8. As outlined
 20 above, HOLA preempts those claims because they employ the common law in a manner that would
 21 more than incidentally affect lending activities. Plaintiff's unjust enrichment claim therefore fails.

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25 ³ In re Ocwen, 491 F.3d at 648.

26 ⁴ Again, Plaintiff seeks to hold World accountable for fraud despite failing to identify a single allegedly fraudulent act
 27 committed by World. Plaintiff does not even include World in his causes of action for fraud and negligent
 28 misrepresentation. Also, Plaintiff has failed to adequately allege fraud. See fn 2, supra.

E. Injunctive Relief Is Not Available Because Plaintiff Has Not Sought Class Certification

Plaintiff’s argument that he is not pursuing a “representative” claim and, therefore, may seek injunctive relief is nonsensical. Plaintiff attempts to enjoin World “from continuing to engage in unfair competition as defined in [the UCL] *and similar statutes of sister-states.*” FAC ¶ 81 (emphasis added). It is difficult to understand how an injunction applying to World’s behavior in other states is anything but a “representative” action. Plaintiff has no standing to challenge World’s acts in other states. Thus, even under his flawed reading of the UCL, Plaintiff would only be entitled to an injunction prohibiting World’s unfair business practices as they relate to Plaintiff.

F. Punitive Damages Are Not An Available Remedy

Plaintiff concedes that the only basis for his prayer for punitive damages against World is the allegedly fraudulent conduct of Atlas Realty, Alvin Silbernagel and Samantha Trevino. Opp. 16:21-23. As outlined above, World is not responsible for these parties' acts as a matter of law and Plaintiffs' prayer for punitive damages necessarily fails.

G. The Court May Judicially Notice World's Status As A Federally Chartered Bank

Plaintiff asks that this court ignore World’s status as federally chartered bank. Opp. 4:24-5:12. Notably, Plaintiff does not and cannot dispute World’s status, but instead claims the bank’s certificate of corporate existence issued a month prior to the consummation of the underlying transaction is insufficient to support the proposition that World has been federally chartered at all relevant times. Opp. 4:24-5:12. Courts routinely recognize the federally chartered status of a bank as part of a motion dismiss. See, e.g., Silvas, 421 F. Supp. 2d 1317. Indeed, Plaintiffs cite at least two cases where World’s status as a federally chartered bank was recognized. See Opp. 7:13-19, citing Hussey-Head v. World Savings and Loan, 111 Cal. App. 4th 773, 782 (2003); Gibson v. World Sav. & Loan Ass’n, 103 Cal. App. 4th 1291 (2002). World’s status is readily verifiable by a

1 referring to multiple sources of indisputable accuracy including its certificate of corporate existence
 2 (issued a month before the disputed transaction) as well as the OTS' website. See
 3 <http://www.ots.treas.gov/inssql/search-form.cfm?catNumber=70&firstview=1>. In the interest of
 4 narrowing the issues presented by Plaintiff's FAC, the Court should notice the World's indisputable
 5 status as a federally chartered bank.

6

7 **H. Any Attempt By Plaintiff To Amend Would Be Futile**

8

9 **1. Plaintiff Cannot Amend His CLRA Claim To State A Cause Of Action**

10

11 Acknowledging he failed to state a cause of action under California Civil Code
 12 Section 1770 *et seq.* ("CLRA"), Plaintiff asks the Court for leave to amend this claim. As Plaintiff
 13 necessarily recognizes, if amendment of his complaint would be futile, leave to amend should be
 14 denied. Albrecht v. Lund, 845 F.2d 193 (1988). Tellingly, Plaintiff offers no explanation as to why
 15 allowing him to attempt to cure the defects inherent in his CLRA cause of action would not be futile.
 16 Plaintiff can not plead around the fact that the transaction at issue is a loan and that the CLRA does
 17 not apply to loans. Van Slyke v. Capital One Bank, No. C 07-00671, 2007 U.S. Dist. LEXIS 44072
 18 (N.D. Cal. June 7, 2007). Similarly, Plaintiff cannot rectify the defects in his CLRA cause of action
 19 because HOLA preempts state law causes of action grounded in allegedly fraudulent advertising
 20 practices. Oklahoma Bankers Assoc. v. Home Sav. & Loan Assoc., 625 F. Supp. 993, 997 (1984);
 21 Mar. 10 OTS Letter at 15. Moreover, allowing Plaintiff to amend his CLRA claim would prejudice
 22 World because it would have to file another motion to dismiss addressing issues that properly should
 23 have been litigated and decided here, namely the applicability of the CLRA to extensions of credit
 24 and whether the HOLA preempts the CLRA as applied. Because Plaintiff cannot avoid either of
 25 these fatal flaws with amendment, the Court should deny Plaintiff's request for leave to amend his
 26 CLRA claim.

1 **2. Plaintiff Cannot Amend His Other Causes Of Action To State a Claim**

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3 Plaintiff's opposition concludes with a request for leave to amend any deficient claim.
4 Leave to amend should not be granted here because Plaintiff can plead no facts salvaging his
5 inherently flawed claims. Albrecht v. Lund, 845 F.2d 193 (1988).

6
7 **III. CONCLUSION**

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9 Plaintiff's state law claims should be dismissed as to World because his FAC fails to
10 state facts under which relief may be granted. Nothing in Plaintiff's FAC or Opposition dictates a
11 contrary result.

12
13 DATED: November 30, 2007.

14 REED SMITH LLP

15
16 By /s/ Keith D. Yandell _____
17 Jack R. Nelson
18 Keith D. Yandell
19 Attorneys for Defendant World Savings Bank, FSB
20 (erroneously sued as "World Savings, Inc. dba
21 World Savings Bank FSB")
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